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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK JAMES SPENCER,

Defendant and Appellant.

H035086

(Santa Clara County

Super. Ct. No. CC933539)

Defendant Mark James Spencer appeals from a judgment of conviction entered after a jury found him guilty of three counts of burglary of a vehicle (Pen. Code, §§ 459, 460, subd. (b) - counts 1, 2, 3)<sup>1</sup> and one count of receiving stolen property (§ 496, subd. (a) - count 5). Defendant also admitted the allegations that he had served four prior prison terms (§ 667.5, subd. (b)). The trial court sentenced defendant to eight years in prison. On appeal, defendant contends: the trial court's comment that a witness was "willfully evasive" constituted a directed verdict in violation of his constitutional rights; the consecutive sentence on count 5 violated section 654's ban on multiple punishment; and he is entitled to additional conduct credits pursuant to amended section 4019. For the reasons stated below, we affirm the judgment.

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<sup>1</sup> All further statutory references are to the Penal Code.

## **I. Statement of Facts**

On March 9, 2008, a series of auto burglaries occurred in Los Gatos. At approximately 8:00 or 8:30 a.m. on that date, Susan Bunce parked her Acura MDX in the parking lot of the Blossom Hill School. Shortly thereafter, Amy Boyd parked her GMC Yukon in the same area. While Bunce and Boyd were attending a Little League game, the passenger windows of their vehicles were smashed. A teal shoulder bag, which contained a Louis Vuitton daytimer, wallet, checkbook cover, key chain, change purse, Chanel sunglass case, and \$2,000, was taken from Bunce's vehicle. Bunce recovered some of these items, but she did not recover the checks that were in her checkbook or the debit or credit cards. A brown purse and wallet, which contained cash, uncashed checks, gift cards, and credit cards, her checkbook, and her driver's license, were taken from Boyd's vehicle. Boyd identified some of her stolen cards, her driver's license, and her purse from photographs shown to her in court.

On the day of the burglaries, Norma Kinser was driving west on Blossom Hill Road when she saw two men running from the Blossom Hill School parking lot. She described one of them as a white male, who was wearing a baseball cap, black striped shirt and jeans, and carrying a purse, and the other as a dark-skinned, Hispanic or black male in a dark shirt, jeans, and a bandanna. Both men entered a parked, white Ford Explorer. The driver was already in the vehicle. Kinser wrote down the license plate number and gave it to the police.

At about 10:30 a.m. on March 9, 2008, Thomas Doslak parked his GMC Denali in the parking lot of the Courtside Club. When Doslak returned to his vehicle, he saw that the right front passenger window was broken and his wife's Coach bag was missing. The Coach bag contained a baby blanket and other items. Doslak identified the Coach bag and baby blanket from photographs shown to him in court.

A videotape taken from parking lot of the Courtside Club was played for the jury. It showed a white Ford Explorer driving into the parking lot on March 9, 2008. Someone exited the vehicle at 11:37 a.m.

On March 9, 2008, Shannon Haugen was driving near the Courtside Club when he saw a “young male sprinting across the street like he was carrying a football at a hundred yard dash.” This man, who was in his 20’s and had dark hair, entered the rear passenger side of a white Ford Explorer, which then sped off at a high rate of speed. Haugen drove up beside the car, and saw the man dumping the contents out of a purse. The front passenger in the Explorer was an older male in his 40’s or 50’s. The female driver was in her 40’s. Both the driver and the front passenger were looking back as the man went through the purse, and the driver appeared to be motioning to the rear passenger to keep it down. Haugen called the police and gave them the license plate number of the Explorer.<sup>2</sup>

On March 9, 2008, Detective Todd Wellman went in an unmarked police vehicle to conduct surveillance at 3938 Yolo Drive in San Jose. He was waiting to see if suspects in a Los Gatos case showed up in a Ford Explorer with a specific license plate. At about 3:13 p.m., a white Ford Explorer pulled up in front of 3938 Yolo Drive. The driver matched the description that Wellman had been given. He observed a white male with long hair in the back seat, and a male passenger in the front seat. Wellman drove closer to the Explorer and activated his lights and siren. He also removed his baseball cap and made his police uniform more visible.

When Wellman opened his door, the Explorer began to back up. Both the driver and the front passenger, who was later identified as defendant, appeared

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<sup>2</sup> Detective Kevin Elliott testified that two other auto burglaries were reported on March 9, 2008. There were burglaries of a Honda Civic in the parking lot of the Los Gatos Diner and a Ford Explorer that was parked on University Avenue near Blossom Hill Road.

surprised when they saw Wellman. Defendant began yelling, looking behind him, and gesturing with his thumb in a “back up motion.” As the Explorer continued in reverse, Wellman followed in his vehicle. At one point, defendant exited the Explorer and ran through some apartment buildings. Defendant, who was carrying something, had very short hair and a mustache. He was wearing denim shorts and a black shirt with the letters SF in orange. Both the driver Natalia Kimbrel and the passenger Billy Auston were arrested. Auston was wearing a black and white striped T-shirt and jeans, black baseball cap, black handkerchief, and black gloves. Auston admitted that he broke a window in a vehicle at the Courtside Club. He also claimed that there was a fourth person in the Explorer named “T.”

The following day, Officers John Alldredge and Steve Walpole searched the Explorer. They found a blue backpack in the front passenger seat that contained a Chanel eyeglass case with gift cards in it. The blue backpack also contained credit cards, gift cards, and a driver’s license in Boyd’s name. In addition, there was a black handbag that contained credit cards in both Bunce’s and Boyd’s names, another handbag underneath a brown Louis Vuitton bag, a Louis Vuitton wallet and coin purse containing gift cards or credit cards in Boyd’s name, and a loaded syringe in the front passenger seat. There was a Coach bag, some false teeth, and a Target receipt in the back seat. There were gift cards, lotto tickets, and CD’s in various locations in the vehicle.

Kimbrel testified for the prosecution. Kimbrel owned a white Ford Explorer in March 2008. On March 9, 2008, she picked up Auston, who had been her friend for a couple of years, near Yolo Drive. She also picked up defendant, whom she had known less than a month. Kimbrel did not remember whether defendant told her that she could make some money. She did not remember talking to the police. She did not remember where defendant was sitting in the Explorer. She did not remember telling the police that defendant was sitting in the front seat. She did not remember where she

drove that day, or what she told the police. She did not remember whether defendant exited the Explorer and then returned. She stated that she had lived in Los Gatos her “whole life,” that is, 23 years, but she did not drive to Los Gatos “that much.” In response to the prosecutor’s questions, Kimbrel continued to state, “I don’t remember.”

The prosecutor played a videotape of Kimbrel’s interview with the police on March 9, 2008. Kimbrel stated that defendant asked her to give him a ride that day, and he said that she could make some money. Auston was with her. Defendant directed Kimbrel to drive them to several places in Los Gatos. She did not see the burglaries. They first went to the parking lot at Blossom Hill School. She remained in the vehicle while Auston and defendant went into the parking and then returned with purses. They next went to the parking lot at the Courtside Club, where Auston burglarized a car. Meanwhile, defendant was going through the purses.

After the burglaries, they went to a gas station and Target to try to use the credit cards. Kimbrel did not know anything about a burglary in the parking lot of the Los Gatos Diner, though she said that they had gone to an apartment complex near the restaurant. Kimbrel did not know how many cars were burglarized that day, but she made at least three stops.

Kimbrel also testified that she had used methamphetamine before she picked up Auston and defendant, and she had been up for about three days. Kimbrel pleaded guilty or no contest to four counts of auto burglary and one count of possession of stolen property.

Shortly before trial on September 21, 2009, Kimbrel gave the prosecutor a statement that had been notarized on September 14, 2009. Auston accompanied Kimbrel when she gave the statement to the notary. According to the statement, when they were stopped by the police, Auston told Kimbrel to blame defendant for the burglaries because he had run away. However, defendant was only in her car for 10

minutes. She had picked up defendant at the Bonfair Mini-Mart around 3 p.m. and was giving him a ride home when she was stopped by the police. Auston and his friend “T” had also been in her car, and she had last seen “T” when they went to Target. Kimbrel testified that Auston told her to write the statement and provided some of the information. She also testified that the written statement was not “actually true.”

Five telephone calls between defendant and Auston were introduced into evidence.<sup>3</sup> When defendant first called Auston on September 8, 2009, Auston was not home. On September 10, 2009, defendant called Auston to tell him that he and Kimbrel should each get a notarized letter. Auston asked, “A notarized letter that says what?” Defendant replied, “You -- you know what to say.” When Auston said Kimbrel was not going to have her letter notarized, defendant said, “No, no, no, dude. I’m tryin’ not to go to trial.” Defendant also stated, “If I get that, I’ll -- I’ll -- I’ll fuckin’ submit and they’ll drop it.” When Auston said that Kimbrel had changed her statement, defendant responded that it “wasn’t good” and that she was “tryin’ to say I was in the car earlier that day, you know?” Defendant continued, “You know, that’s not good enough. The DA can run with that.” Defendant wanted Auston to send him the notarized statements “ASAP.” Defendant also asked Auston to contact “Lesha” and have her provide a statement on defendant’s behalf “so it gets dropped.”<sup>4</sup> He wanted Lesha to say “how I fuckin’ was with her and shit.” Defendant also wanted Auston to contact “Walt” and “Milan” to help him.<sup>5</sup>

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<sup>3</sup> The trial court instructed the jury that Auston’s statements were not offered for their truth, but were provided to give context to defendant’s statements.

<sup>4</sup> Kimbrel referred to Lesha as defendant’s girlfriend in her notarized statement.

<sup>5</sup> According to Kimbrel’s notarized statement, Milan rented a room to defendant and Lesha.

In a telephone call on September 13, 2009, Auston told defendant that Kimbrel was going to write a statement in which she would say that defendant was not there. Defendant asked Auston to mail copies to the district attorney and to him.

On September 15, 2009, Auston told defendant that Kimbrel's statement had been notarized. However, Auston could not get his statement notarized because he did not have identification. Defendant also wanted Auston and Kimbrel to talk to the prosecutor about his case. Defendant directed Auston to make telephone calls in order to find Lesha to get her notarized statement. He also asked Auston to get Milan's statement.

The last telephone call was on September 22, 2009. Defendant was upset because Milan's "statement is a total lie. He totally backed out of fuckin' everything, dude." Defendant believed that if Milan and Lesha had "stepped forward, they would have dropped it yesterday." Instead, Milan stated, "I seen him early in the morning but then I fell asleep and that nobody was there when I woke up. I'm like, oh, my God, dude." At defendant's direction, Auston called several numbers in an attempt to locate Lesha.

It was stipulated that Auston was charged and pleaded guilty or no contest to four counts of auto burglary and one count of receiving stolen property.

## **II. Discussion**

### **A. Trial Court's Comment about Kimbrel Being Willfully Evasive**

Defendant contends that the trial court "erroneously instructed the jury that Kimbrel was 'willfully evasive'" and that this "instruction further directed a verdict on witness credibility contrary to the Sixth and Fourteenth Amendments."<sup>6</sup>

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<sup>6</sup> Defendant does not challenge the trial court's ruling that Kimbrel's inconsistent statements were admissible.

## **1. Background**

At the beginning of the trial, the court instructed the jury: “Do not take anything that I say or do during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.” The trial court gave a similar instruction at the end of the trial.

Kimbrel testified in the prosecution case. She testified: she owned a white Ford Explorer in March 2008; on March 9, 2008, she picked up Auston, who had been her friend for a couple of years; she also picked up defendant, whom she had known less than a month; she drove them someplace; she did not see defendant break any vehicle windows; she had lived in Los Gatos her entire life, but she did not know where Blossom Hill School was; she went to the Los Gatos Police Department sometime that day; and one of the purses in her car was hers. However, Kimbrel did not remember whether defendant told her that she could make some money. She did not remember talking to the police. She did not remember where defendant was sitting in the Explorer. She did not remember telling the police that defendant was sitting in the front seat. She did not remember where she drove that day, or what she told the police. She did not remember whether defendant exited the Explorer and then returned. In response to almost all of the prosecutor’s questions regarding that day, Kimbrel continued to state, “I don’t remember.”

There was an unreported sidebar conference. After the conference, the trial court stated: “This Court finds that the witness is being willfully evasive. And as a result, under clear California law, the district attorney will be allowed to show the jury inconsistent statements that she has previously made if in fact she’s done that.”

Following the court’s statement, the prosecutor played the videotape of Kimbrel’s police interview on March 9, 2008.

## 2. Analysis

The People argue that the issue has been forfeited, because defendant failed to object to the trial court's comment. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) However, even assuming that the issue has not been forfeited, we find no error.

The propriety of judicial comment on the evidence or the credibility of a witness is evaluated “‘on a case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury.’ [Citation.] ‘The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made. [Citation.]’” (*People v. Sanders* (1995) 11 Cal.4th 475, 531-532.) The court may comment so long as its remarks are “‘accurate, temperate, and “scrupulously fair”’” and do not invade the jury's province. (*Id.* at p. 531.)

Even if we assume that the trial court should not have made its ruling in front of the jury, its very brief comments were accurate, temperate, and fair, and they did not invade the jury's province. The trial court was merely stating the obvious, since Kimbrel's attempts to evade the prosecutor's questions were blatant. Even absent the trial court's remarks, the jury could not have failed to notice Kimbrel's evasion.

Moreover, the trial court did not actually comment on the credibility of Kimbrel's actual testimony, and it is inconceivable that the jury was prejudiced by its very brief, accurate, and temperate comment. The trial court instructed the jury twice not to take anything that the trial court said as indicating its thinking about the facts, the witnesses, or what the jury's verdict should be. The trial court also gave the instruction that the jury could “disregard any or all of [its] comments [it had] made about the evidence or whatever weight [the jury thought was] appropriate . . . .” Under these circumstances, the trial court's comment about Kimbrel's willful evasiveness was not improper.

Contrary to defendant's claim, the jury could not have understood the trial court's comment as a directed verdict on Kimbrel's credibility. Here, the trial court gave explicit instructions that the jury was the sole judge of the witnesses' credibility. The trial court instructed the jury: "You must decide what the facts are. It's up to all of you and you alone to decide what happened based upon the evidence that has been presented to you in this trial." "You alone must judge the credibility of the witnesses and every one of them. In deciding whether the testimony is true and accurate, use your common sense. Use your experience. You must judge the testimony of each witness by the same standards setting aside any bias or prejudice you may have. . . . Consider the testimony of each witness and decide how much of it you believe." "Do not automatically reject testimony simply because of inconsistencies or conflicts." We must presume the jury followed the trial court's instructions. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) Accordingly, we reject defendant's contention.

## **B. Section 654**

Defendant next contends that the trial court violated the prohibition against multiple punishment under section 654 when it imposed separate terms for auto burglary (counts 1, 2, and 3) and receiving stolen property (count 5). He also contends that the trial court improperly imposed restitution and parole revocation fines based on count 5.

At the sentencing hearing, defense counsel argued that defendant could not be punished separately for receiving stolen property under section 654. The prosecutor argued that "the set of facts that the 496 is based on are different than the facts that the burglary was based on. Defendant was in possession of at least the \$2,000 and a checkbook for the time that he departed this scene and went off sprinting until who knows when. He wasn't picked up for another year." She also argued that the elements and facts of the auto burglaries and the receiving stolen property charge were

separate and distinct. Defense counsel responded that section 654 controlled because “the intent of the burglaries [was] to get the items which were found in the car. . . . It’s the same goal.” The trial court stated, “I do not find that section 654 is applicable to the 496 violation[.]” The trial court sentenced defendant to the two-year midterm on count 1, consecutive eight-month terms on counts 2, 3, and 5, and consecutive four years for the prior prison term findings.

Section 654 provides in relevant part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (§ 654, subd. (a).) Thus, “[s]ection 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct.” (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) Whether multiple offenses are incident to one objective “‘depends on the *intent and objective* of the actor.’” (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) The trial court’s determination that a defendant maintained multiple criminal objectives is a question of fact that must be upheld if it is supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) “We review the trial court’s findings ‘in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]’” (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

Defendant relies on *People v. Allen* (1999) 21 Cal.4th 846, 866-867 (*Allen*), in which the California Supreme Court held that a defendant could be convicted of both burglary leading to the theft of property and receiving the same stolen property. The *Allen* court also noted in passing that the trial court properly stayed sentence on the receiving stolen property conviction pursuant to section 654. (*Allen*, at p. 867.)

However, the present case is factually distinguishable from *Allen*. Here, there was substantial evidence to support the trial court’s finding that the receiving stolen

property conviction was not based solely on the burglaries of the Bunce, Boyd, and Doslok vehicles. There were many more stolen items in Kimbrel's vehicle than those taken from these victims. There were additional purses and bags that did not belong to the named victims and had not been claimed by Kimbrel, Auston, or defendant. There was also evidence that more than three burglaries had occurred that day. Though Kimbrel claimed that she did not know about them, she acknowledged that they were in the area of the other burglaries at the relevant time. Moreover, she did not know how many cars were burglarized, but she made three stops.<sup>7</sup> Thus, defendant's intent as to count 5 was different from his intent in taking property in the Bunce, Boyd, and Doslak burglaries. Accordingly, the trial court did not err in imposing a consecutive eight-month sentence on count 5.<sup>8</sup>

### **C. Amended Section 4019**

Defendant also contends that he is entitled to additional presentence conduct credits pursuant to amended section 4019.<sup>9</sup>

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<sup>7</sup> In her closing argument, the prosecutor stated that the receiving stolen property count could be based on items that were not found in the Ford Explorer, such as Bunce's checkbook. However, she also argued that the evidence established that "there's a whole car full of property that's been stolen." She noted that defendant was sitting in the front passenger seat where most of this property was found. She further argued that the charge could be based on concealing or withholding stolen property, and that "defendant did that with everything that was in this car and certainly the stuff he ran away with that was stolen."

<sup>8</sup> Noting that the prosecutor argued at the sentencing hearing that the receiving stolen property conviction was based on his possession of the checkbook and the \$2,000 which were not found in the Kimbrel's Ford Explorer, defendant contends that the People cannot change their theory on appeal. There is no merit to this contention. The trial court was not required to accept the prosecutor's theory at sentencing. The issue before this court is whether the trial court's finding is supported by substantial evidence.

<sup>9</sup> This issue is currently before the California Supreme Court in *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963.

A defendant sentenced to state prison is entitled to credit against the term of imprisonment for all days spent in custody prior to sentencing. (§ 2900.5, subd. (a).) A defendant may also earn additional presentence credit for satisfactory performance of assigned labor (§ 4019, subd. (b)) and compliance with rules and regulations (§ 4019, subd. (c)).<sup>10</sup> “‘Conduct credit’ collectively refers to worktime credit pursuant to section 4019, subdivision (b), and to good behavior credit pursuant to section 4019, subdivision (c). [Citation.]” (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) Under the former version of section 4019, a defendant earned two days of conduct credit for every four actual days served in local custody. (Former § 4019, subds. (b), (c).) However, in October 2009, Senate Bill No. 18 was enacted. Among other things, amended section 4019 increased conduct credits for defendants who have no current or prior convictions for serious or violent felonies and who are not required to register as sex offenders. (§ 4019, subds. (b)(1), (c)(1).) These defendants are now eligible to earn two days of conduct credits for every two days of actual custody. (§ 4019, subds. (b)(1), (c)(1).)

Here, the trial court awarded presentence credits under former section 4019. Though the parties do not discuss defendant’s extensive criminal record, it appears that he has no current or prior convictions for serious or violent felonies and he is not required to register as a sex offender. In discussing whether amended section 4019 applies to the present case, we will assume that defendant has no such prior convictions and is not subject to a sex registration requirement.

Section 3 states that no part of the Penal Code is “retroactive, unless expressly so declared.” The California Supreme Court has interpreted section 3 “to mean ‘[a]

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<sup>10</sup> Our references to section 4019 or amended section 4019 are to the version of section 4019 which took effect on January 25, 2010. Section 4019 has since been revised yet again, effective on September 28, 2010. None of our references are to this current version of section 4019.

new statute is generally presumed to operate prospectively absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended otherwise. [Citation.]’ ” (*People v. Alford* (2007) 42 Cal.4th 749, 753 (*Alford*)). “[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application.” (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209 (*Evangelatos*)).

The Legislature did not expressly state which version of section 4019 should apply to cases not yet final as of its effective date. Thus, we must determine whether the Legislature’s intent is “very clear from extrinsic sources.” (*Evangelatos, supra*, 44 Cal.3d at p. 1209.)

There is an exception to the general rule of prospective application. “[A]bsent a saving clause, a defendant is entitled to the benefit of a more recent statute which mitigates the punishment for the offense or decriminalizes the conduct altogether. [Citations.]” (*People v. Babylon* (1985) 39 Cal.3d 719, 722.) This rule was first articulated in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). In that case, the California Supreme Court reasoned that “[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply.” (*Id.* at p. 745.)

At issue then is whether a statute that increases presentence credits lessens punishment within the meaning of *Estrada*. *People v. Hunter* (1977) 68 Cal.App.3d 389 (*Hunter*) addressed this issue in connection with custody credits. In 1976, the Legislature amended section 2900.5 to provide that a defendant was entitled to custody

credits against a county jail sentence imposed as a condition of probation. (*Hunter*, at p. 392.) Applying *Estrada*, *Hunter* held that the amendment to section 2900.5 “must be construed as one lessening punishment,” and thus applied the amended statute retroactively. (*Hunter*, at p. 393.)

*People v. Doganiere* (1978) 86 Cal.App.3d 237 (*Doganiere*) considered whether amended section 2900.5 that entitled a defendant to conduct credits while in custody pursuant to a probation order applied retroactively. (*Doganiere*, at pp. 238-239.) The court rejected the People’s argument that custody credits were distinguishable from conduct credits because conduct credits are “designed to control *future* prison inmate behavior, encourage *future* cooperation in prison programs, and foster *future* inmate self-improvement.” (*Id.* at p. 239.) *Doganiere* concluded that “[u]nder *Estrada*, it must be presumed that the Legislature thought the prior system of not allowing credit for good behavior was too severe.” (*Id.* at p. 240.) We disagree with the reasoning in *Doganiere*. In enacting legislation to authorize conduct credits, the Legislature is not seeking to lessen punishment. Rather, “conduct credits are designed to ensure the smooth running of a custodial facility by encouraging prisoners to do required work and to obey the rules and regulations of the facility.” (*People v. Silva* (2003) 114 Cal.App.4th 122, 128.)

In *In re Stinnette* (1979) 94 Cal.App.3d 800 (*Stinnette*), the court considered whether prospective application of the conduct credit statutes of the recently enacted Determinate Sentencing Act violated petitioner’s equal protection rights. *Stinnette* rejected the equal protection challenge, reasoning that the purpose of the statutes was “motivating good conduct among prisoners so as to maintain discipline and minimize threats to prison security. Reason dictates that it is impossible to influence behavior after it has occurred.” (*Stinnette*, at p. 806; *People v. Guzman* (1995) 40 Cal.App.4th 691, 695 [“The purpose of Penal Code section 4019 is to encourage good behavior by incarcerated defendants prior to sentencing.”].) Similarly, here, prospective

application of amended section 4019 could have no affect on a defendant's past behavior.

Since there is no “‘compelling implication that the Legislature intended otherwise’” (*Alford, supra*, 42 Cal.4th at p. 753), we conclude that amended section 4019 applies prospectively.

### **III. Disposition**

The judgment is affirmed.

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Mihara, J.

I CONCUR:

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Bamattre-Manoukian, Acting P. J.

McAdams, J., Concurring and Dissenting.

I concur in parts II A and B of the opinion (the issues concerning the trial court's comments and Penal Code section section 654) but I dissent as to part C (the application of amended Penal Code section 4019).

I dissent because I agree with the reasoning of the numerous cases that have held the amendments apply retroactively.<sup>1</sup> In my view, such a conclusion follows from California Supreme Court precedent. As the Court reiterated in *People v. Nasalga* (1996) 12 Cal.4th 784, "provisions of a statute that have an ameliorative effect must be given retroactive effect, even where other provisions of the same statute clearly do not have such an effect." (*Id.* at p. 796, following *In re Estrada* (1965) 63 Cal.2d 740.) I would therefore find the amendments to Penal Code section 4019 at issue here apply retroactively.

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McAdams, J.\*

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<sup>1</sup> The California Supreme Court has recently granted review in several cases involving this issue, including those which have found the statute applies retroactively (*People v. Brown*, S181963; *People v. House*, S182813; *People v. Landon*, S182808) and those which found it applies prospectively only. (*People v. Rodriguez*, S181808; *People v. Hopkins*, S183724.) Several more petitions for review are pending.

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\*Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.